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Peter N. Scolney

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NOTES AND COMMENTS

Toward A Jurisprudential Theory of International Law: Directions for Future Thought

With the development of the European Economic Community and other international organizations formed for similar purposes, international law has reached a new level of sophistication. This article will examine the philosophical bases underlying international law stemming from the two traditional theories of jurisprudence—*legal positivism* and *legal naturalism*. It will be argued that neither theory can account for modern developments in international law and that the current state of legal theory has been surpassed by legal practice.

Each of the traditional theories includes, as a central component, an explanation of *legal validity*. The concept of legal validity can be partly explained in terms of obligatory obedience. To say that a particular rule of law is valid is to say, either directly or by implication, that there is a *prima facie* reason to obey that rule. An explanation of legal validity has traditionally been the cornerstone of a theoretical explanation of the existence and operation of law. This article will, therefore, focus on the positivist and naturalist theories of legal validity and their resulting explanations of the existence and operation of international law.

I. THE POSITIVIST ACCOUNT

For the legal positivist, the essential criterion of validity is pedigree. This is to say, if a rule has been properly created, then that law is valid; otherwise, it is invalid. The positivist looks to the *method* by which the rule came into being, not to its content. Thus, for the positivist, the content of a rule is irrelevant to any determination of validity, at least insofar as the content has no bearing on the legitimacy of the creation of the rule.¹

A brief examination of the leading modern positivist accounts of validity will be helpful in understanding the problem that inter-

1. For a more detailed account of both the history and operation of positivist jurisprudence, see, e.g., W. FRIEDMANN, *LEGAL THEORY* (5th ed. 1967).

national law presents to orthodox positivism. The views to be examined are those of Hans Kelsen² and H. L. A. Hart.³

For Kelsen, a legal order is to be understood in terms of what it accomplishes and the means by which it is accomplished. A legal order is a complete legal system. Briefly stated, a legal order regulates the behavior of human beings in order to provide a collective security for those subject to that order through the issuance of norms (*i.e.*, rules). Additionally, a legal order is to be thought of as a coercive social order which is, at least potentially, internally consistent and, arguably, effective or, minimally, recognized by those subject to it. These individual elements of any legal order will be considered individually and their interdependence will be demonstrated.

The primary element of any legal order, for Kelsen, is the norm. That any human activity is legal or illegal is determined by reference to a norm and not to any mere physical phenomena. As Kelsen puts it:

What turns this event into a legal or illegal act is not its physical existence, determined by the laws of causality prevailing in nature, but the objective meaning resulting from its interpretation. The specifically legal meaning of this act is derived from a "norm" whose content refers to the act; this norm confers legal meaning to the act, so that it may be interpreted according to this norm.⁴

There are two significant points which may be suggested by this passage. The first is that, for Kelsen, there can be no meaningful discussion of the legal status of any act outside of a system. Kelsen would maintain that all laws are positive laws. The second, and possibly misunderstood, point is that the existence of a set of norms is a necessary, but not sufficient, condition for there to be a legal order.

Keeping in mind that one goal of any legal order is to provide for collective security, it seems appropriate that there be some means of encouraging adherence to the behavior directed by the norms of any legal order. Kelsen maintains that each norm is to be construed as a hypothetical proposition, the antecedent of which describes the proscribed behavior and the consequent of which au-

2. Kelsen's views as presented in H. Kelsen, *THE PURE THEORY OF LAW* (M. Knight trans. 1967) are the bases for the position attributed to him in this paper.

3. Hart's views as presented in H. Hart, *THE CONCEPT OF LAW* (1961) form the bases for the position attributed to him in this paper.

4. H. Kelsen, *supra* note 2, at 3-4.

thorizes, upon appropriate proof, the administration of a sanction, by the proper official, to whichever subjects of the system in question engage in the proscribed activity. Consider the following ordinary prohibition:

No smoking.

Such a prohibition is to be interpreted as: If x smokes (in the proscribed place), then y ought to impose a sanction on x (where x is some subject of the appropriate legal order and y is an appropriate official of that same order).

Thus far, then, Kelsen would maintain that a legal order might be considered as a set of norms which are "backed up" by threats of an imposed sanction (*i.e.*, a legal order is a coercive order). However, such a characterization still does not represent a set of sufficient conditions for some order to be a legal order, in that this characterization allows or, perhaps, requires that a highwayman's demand for his victim's valuables, if supported by a threat, be characterized as a special norm and, thus, as part of a legal order.

The significance of the preceding example is not only that there are certain situations in which one's intuitions direct that some conclusion is incorrect, but also that a system cannot be judged to be a legal order simply on the basis of the behavior of those subject to that system. If an outside spectator merely noticed that a set of norms were, for the most part, observed, such a spectator could not legitimately conclude that he had witnessed the functioning of a legal order. Of course, the effectiveness of a legal order (*i.e.*, that the norms of that order are, for the most part, obeyed) is crucial to Kelsen. As he says in his discussion of *legitimacy* and *validity*:

A constitution is "effective" if the norms created in conformity with it are by and large applied and obeyed. As soon as the old constitution loses its effectiveness and the new one has become effective, the acts that appear with the subjective meaning of creating or applying legal norms are no longer interpreted by presupposing the old basic norm, but by presupposing the new one. . . . The principle applied here is the principle of effectiveness. The principle of legitimacy is limited by the principle of effectiveness.⁵

. . . .

Just as the norm (according to which something *ought* to be) as the meaning of an act is not identical with the act (which

5. *Id.* at 210-11. It should be pointed out that, although Kelsen's distinction between the *objective* and *subjective* meanings of acts is certainly not without merit, it is beyond the scope of this paper to give this distinction the attention it deserves.

actually is), in the same way is the validity of a legal norm not identical with its effectiveness; the effectiveness of a legal order as a whole and the effectiveness of a single legal norm are—just as the norm-creating act—the condition for the validity; effectiveness is the condition in the sense that a legal order as a whole, and a single legal norm, can no longer be regarded as valid when they cease to be effective.⁶

The relevant import here is that an alleged legal order, to be a legal order, must be generally effective. Again, however, effectiveness is only a necessary condition for an order's being a legal order.

Once the previously discussed criteria (the existence of norms, the possibility of the imposition of sanctions, and the effectiveness of those norms) have been satisfied, there remains an additional essential property of any legal order—the validity of the norms of a legal order. As Kelsen puts it, "[a] legal norm is not valid because it has a certain content, that is, because its content is logically deducible from a presupposed basic norm, but because it is created in a certain way—ultimately in a way determined by a presupposed basic norm."⁷ There are three significant points suggested by this passage. First, validity of any norm within a system is not a function of the content of that norm. Second, there can be no question regarding the validity of a legal order—it is a norm which is valid or invalid, and not a legal order. Third, validity is a system-relative concept. This means that there can be no question of a single norm's validity outside any order.

A norm is said to be valid within a legal order just in case that norm was created by some individual or group which has been granted the authority to create norms. "Only a competent authority can create valid norms; and such competence can only be based on a norm that authorizes the issuing of norms."⁸ Given this account of validity, it might appear that a vicious infinite regress of norms results. While Kelsen does describe a hierarchy of norms, the infinite regress is apparently avoided by the introduction of the notion of the *basic norm*. For any legal order, there will be one norm whose validity does not depend upon the authorization of some higher norm. The validity of this unauthorized norm is *presupposed*. The basic norm essentially authorizes the creation of other norms:

6. *Id.* at 211-12.

7. *Id.* at 198.

8. *Id.* at 194.

For the basic norm is limited to authorize a norm-creating authority, it is a rule according to which the norms of this system ought to be created. . . . [A] basic norm is presupposed to be valid which authorizes this way of creating norms. . . . The basic norm supplies only the reason for the validity, but not at the same time the content of the norms constituting the system.⁹

While, as can be seen from this passage, the basic norm of any system does not provide the content of any lower norms, the basic norm must not be thought of as merely a locus of ignition for a legal order. In addition to providing a starting point for a legal order, the basic norm serves as the unifying principle within any legal order. Any apparent conflict among norms can be ultimately resolved by an appeal along the hierarchy to the basic norm. The basic norm, then, serves a dual capacity—it provides the impetus for a legal order and it serves to unify a consistent system.¹⁰

As does Kelsen, Hart treats legal systems as social systems. However, the former are to be distinguished from any social system in that legal systems must include, not only rules stating obligations, but also rules whose subject-matter includes the rules which state the obligations—in Hart's terms, a union of *primary* rules and *secondary* rules. To sufficiently appreciate these notions and the need for such a distinction, a brief account of Hart's thought, both on the nature of a legal system and on the proper perspectives for viewing any purported legal system, will prove beneficial.

Hart, in his discussion of the positive contributions of various natural law theories,¹¹ suggests that social systems, for the most part, are initiated for the purpose of establishing a relatively secure environment for those persons who are subject to such a system. This can be seen by examining the following five factual presuppositions. The first presupposition is that human beings are vulnerable to physical injury.¹² The second presupposition is that persons are so made that it is extremely unlikely that one person will sustain dominion over others for any more than a short period of time.¹³ The third presupposition maintains that persons can be characterized as lying somewhere on the continuum which has devils and angels at either extreme.¹⁴ The fourth presupposition states that there are

9. *Id.* at 197.

10. *Id.* at 221-78.

11. HART, *supra* note 3, ch. IX.

12. *Id.* at 190.

13. *Id.* at 190-91.

14. *Id.* at 191-92.

desired and necessary (for survival) objects whose supply is not unlimited.¹⁵ The final presupposition maintains that human beings are neither omniscient nor immune from what Aristotle termed *akrasia*, or weakness of the will.

Granting these factual presuppositions, any legal system must provide a framework within which the goal of collective security and survival may be attained. Since these are factual presuppositions, it must be kept in mind that they describe situations which are subject to change; hence, a legal system, if it is to contribute efficiently to the attainment of the desired end, must not be static (*i.e.*, the system must provide a means for dynamism as factual situations are altered). Additionally, legal systems in particular, must differ from social systems in general, in that the former will provide, while the latter need not provide, an effective means of enforcement of rules primarily designed to attain the desired ends.

In Chapter V of *The Concept of Law*,¹⁷ Hart specifically addresses himself to the differences between a prelegal, or simple social structure, and a complete legal system. The prelegal structure is a so-called system with only primary rules (*i.e.*, the only rules are rules which state the obligations of the persons subject to the structure). Hart points out three crucial defects in the prelegal structure: uncertainty, static character and the inefficiency of social pressure in maintaining conformity to the rules.

A prelegal structure is uncertain because, in borderline cases, there will be no means available to those subject to it to determine whether or not there has been a transgression of a primary rule. As Hart puts it:

Hence if doubts arise as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt, either by reference to an authoritative text or to an official whose declarations on this point are authoritative. For, plainly, such a procedure and the acknowledgement of either authoritative text or persons involve the existence of rules of a type different from the rules of obligation or duty which *ex hypothesi* are all that the group has.¹⁸

As knowledge of the demands of the primary rules is unlikely, a prelegal structure is likely to be unsuccessful in attaining the goals discussed above.

15. *Id.* at 192-93.

16. *Id.* at 193.

17. *Id.* at 77-96.

18. *Id.* at 90.

A prelegal structure has a static character in that rules can only change through the process of change-in-custom—there being no authorized body to legislate, there can be no rapidly announced change in rules. Given that factual situations change, and such alteration may require additional or, perhaps, fewer obligations on the part of the subjects of the structure, the prelegal condition is inadequate in that it may not have the capacity for the introduction of necessary immediate change.

The prelegal condition would be inefficient in the sense that enforcement of the primary rules would not be centralized and, most likely, would not be certain. "It is obvious that the waste of time involved in the group's unorganized efforts to catch and punish offenders, and the smouldering vendetta which may result from self help in the absence of an official monopoly of 'sanctions', may be serious."¹⁹ The point here is that such an inefficient allocation of resources would hamper the attainment of the desired ends for which any legal system should serve as a means.

Hart introduces the notion of a secondary rule as a remedy to these three crucial defects in the prelegal condition. Such rules, and the distinction between them and primary rules, are characterized by Hart in the following passage:

Though the remedies consist in the introduction of rules which are certainly different from each other, as well as from the primary rules of obligation which they supplement, they have important features in common and are connected in various ways. Thus they may all be said to be on a different level from the primary rules, for they are all *about* such rules; in the sense that while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violations conclusively determined.²⁰

Hart introduces a different secondary rule for each of the aforementioned deficiencies. To remedy the problem of uncertainty, the *rule of recognition* is suggested. A rule of this type serves the purpose of conclusively identifying the primary rules. As Hart puts it, in referring to a possible historical introduction of a rule of recognition:

[W]hat is crucial is the acknowledgement of reference to the writing or inscription as *authoritative*, i.e., as the *proper* way of dispos-

19. *Id.* at 91.

20. *Id.* at 91-92.

ing of doubts as to the existence of the rule. Where there is such an acknowledgment there is a very simple form of secondary rule: a rule for conclusive identification of the primary rules of obligation.²¹

As remedies for the defects of the static character of the system and its inefficiency, Hart proposes rules of change—rules which empower an individual or group thereof to create primary rules of obligation—and rules of adjudication—rules which authorize individuals or groups to determine if a transgression has occurred.

While Hart rightly maintains that primary rules and secondary rules are of different orders, it must also be pointed out that not all secondary rules are of the same order. As can be seen, in order to determine what the rules of change and rules of adjudication are, rules of recognition must be employed. Though never explicitly distinguishing the possible order-differences among secondary rules, Hart's notions of supreme criterion and ultimate rule depend upon such a distinction. These two notions are introduced by Hart in his discussion of legal validity.

In contrast to Kelsen, who, as has been argued above,²² maintains that effectiveness is a condition of validity, Hart desires to exclude what he terms "efficacy" from any discussion of validity. By "efficacy" Hart means "the fact that a rule of law which requires certain behaviour is obeyed more often than not."²³ This separation of validity of a rule from its "efficacy" depends, for Hart, upon the distinction between the internal and external points of view. The internal point of view is that viewpoint taken from within any system.²⁴ From such a perspective, a rule of law is valid just in case that rule is accepted as law by the appropriate officials and, also, by the general citizenry of that system. From the external point of view, a rule is valid just in case it satisfies the criteria provided by the rule of recognition of the system which is being viewed.²⁵ Internally then, validity is a function of attitude, while externally, it is a function of the criteria set forth by the rule of recognition. Another way of viewing this distinction is that internal statements express a feeling of the speaker, while external statements express facts about the system under consideration. Given this distinction, the

21. *Id.* at 92.

22. See note 6 *supra* and accompanying text.

23. H. HART, *supra* note 3, at 100.

24. *Id.* at 101.

25. *Id.* at 99-102.

following passage explains why there is no necessary connection for Hart between effectiveness and validity:

From the inefficacy of a particular rule, which may or may not count against its validity, we must distinguish a general disregard of the rules of the system. This may be so complete in character and so protracted that we should say, in the case of a new system, that it had never established itself as the legal system of a given group, or, in the case of a once-established system, that it had ceased to be the legal system of the group. In either case, the normal context or background for making any internal statement in terms of the rules of the system is absent. In such cases it would be generally *pointless* either to assess the rights and duties of particular persons by reference to the primary rules of a system or to assess the validity of any of its rules by reference to its rules of recognition.²⁶

The notion of validity is, then, perspective-dependent or, in other words, system-relative.

From both the internal and external perspectives, the rule of recognition of any system is considered to be ultimate. This notion requires some unpacking in that it has somewhat different interpretations from either perspective. From the external point of view, the rule of recognition provides the supreme criterion of validity—a purely factual matter, as can be seen from the following passage:

We may say that a criterion of legal validity or source of law is supreme if rules identified by reference to it are still recognized as rules of the system, even if they conflict with rules identified by reference to the other criteria, whereas rules identified by reference to the latter are not so recognized if they conflict with the rules identified with the rules identified by reference to the supreme criterion.²⁷

From the internal point of view, the rule of recognition is ultimate in that its validity is never questioned. This is not to say that reasons cannot logically be requested regarding acceptance or rejection of that rule; rather, it is to say that no *legal* reasons can be given regarding that rule's validity, while it does provide such reasons for the validity of other rules—both primary and secondary.

We only need the word "validity", and commonly only use it, to answer questions which arise *within* a system of rules where the status of a rule as a member of the system depends on its satisfying

26. *Id.* at 100.

27. *Id.* at 103.

certain criteria provided by the rule of recognition. No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way.²⁸

What can be seen from the above examination of these two most influential examples of contemporary positivism is that any discussion of validity of legal rules presupposes at least three elements. First, there must be some identifiable system, either within which, or about which questions of validity can arise. Second, it must be theoretically possible to construct a principle by appeal to which answers to questions of validity can be provided. Finally, any such system must have at its disposal a mechanism by which its rules may be enforced.

II. THE NATURALIST ACCOUNT²⁹

Opposed to the view of validity taken by the legal positivists is that position adopted by legal naturalists.³⁰ If it is correct to describe the essential positivist criterion of validity as internal to any given system, then the naturalist criterion of validity must be considered as external to any system.³¹ For a naturalist, a rule is valid just in case that rule conforms to some principle (or set thereof); and, in contrast to the positivist, that principle of validity is the same, irrespective of the system under consideration.³²

Natural law theory should be distinguished from the view that a rule's validity is wholly a function of morality. While utilization of morality as a criterion of validity is one feature of legal naturalism,³³ the naturalist position is somewhat more sophisticated. As one commentator has observed: "Thus, a doctrine that the content of justice could not be expressed in anything more specific than one or two general adages would scarcely be one of natural law."³⁴ In addition to an appeal to moral principles, legal naturalists would insist that there is, at least theoretically, a body of law over and

28. *Id.* at 105-06.

29. While the presentation of the legal naturalist position may appear abbreviated, it must be kept in mind that the remarks made by the positivists, with respect to the purposes (and some functions) of legal systems, are relatively similar.

30. This account, as will be seen, is somewhat overstated. Many legal naturalists might argue that there is one overriding system of law by which any "lower" system's validity is determined.

31. M. GOLDING, *PHILOSOPHY OF LAW* 33 (1975).

32. *Id.*

33. Wollheim, *Natural Law*, in 5 *ENCYCLOPEDIA OF PHILOSOPHY* 451 (P. Edwards ed. 1967).

34. *Id.* at 450-51.

above any particular system of positive or person-made law. Father Copleston noted in his discussion of Grotius: "There is a natural social order, and it is the maintenance of this social order which is the source of law."³⁵ Questions of validity, then, for a legal naturalist, are to be answered by a two-step approach. First, the rules which comprise the natural legal order must be discovered. Second, the rule, whose validity is in question, must be compared with the natural rules. If a rule is consistent therewith, then that rule is valid; otherwise, that rule is invalid.³⁶

III. THE POSITIVIST PROBLEM

The major problem posed by international law for the legal positivist is based on a mandatory wait-and-see attitude. Hart points this out in his discussion of Kelsen's account of international law when he writes:

It is, therefore, a mistake to suppose that a basic rule or rule of recognition is a generally necessary condition of the existence of rules of obligation or "binding" rules. This is not a necessity, but a luxury, found in advanced social systems whose members not merely come to accept separate rules piecemeal, but are committed to the acceptance in advance of general classes of rule, marked out by general criteria of validity. In the simpler form of society we must wait and see whether a rule gets accepted or not; in a system with a basic rule of recognition we can say before a rule is actually made, that it *will* be valid *if* it conforms to the requirements of the rule of recognition.³⁷

While this passage is consistent with the philosophical positivist tradition of treating philosophical problems "scientifically," it would appear that international law has been in existence long enough to provide the necessary data to formulate the basic principle of validity.³⁸ However, Hart is correct in rejecting the formulation of such a principle suggested by Kelsen and his followers.

Kelsen's formulation of the basic norm of international law is suggested in his discussion of the theoretical validity of treaties:

35. 3 (pt. II) F. COPLESTON, A HISTORY OF PHILOSOPHY 143 (1963).

36. For a detailed account of both the development of legal naturalism and several inherent difficulties associated therewith, see W. FRIEDMANN, *supra* note 1, at 95-156.

37. H. HART, *supra* note 3, at 229.

38. In the Western world, there have been international legal problems (identified as such) since at least the twelfth century. See Sinha, *The Anthropocentric Theory of International Law as a Basis for Human Rights*, 10 CASE W. RES. J. INT'L L. 498 (1978).

Since this second level, that is, the international law created by international treaties, rests upon a norm of general customary international law (the highest level), the presupposed basic norm of international law must be a norm which establishes custom constituted by the mutual behavior of states as law-creating facts.³⁹

Hart interprets this to mean that states ought to act as they customarily act.⁴⁰ There are two difficulties with this principle of validity: it begs the question of validity and it cannot account for the fast pace within which contemporary international law must change. The principle begs the question of validity by treating any rule of international law as valid, provided that the rule has been accepted by some state. Such a principle explains too much; it validates every rule.

If, on the other hand, emphasis is placed upon the force of "customary," then there could never be a valid first rule. Additionally, there could be no valid change from what has been previously accepted and acted upon. There could never be a valid first treaty because there would have been no prior customary relations among nations. There could never be any valid change because any change would also involve a change in custom. The positivist may reply that with respect to any change there must be a waiting period in order to determine effectiveness. The problem with this reply is that it provides no means of predicting the validity of either any proposed changes in relations or of new kinds of relations among nations. Thus, the positivist is, on this analysis, committed to only retrospective judgments of validity. While the retrospective point of view may have academic significance, it provides little practical benefits.

The positivists' problem, then, is that they cannot provide a theoretical explanation of a relatively new development without, apparently, engaging in a most obvious sort of bootstrapping.⁴¹

IV. THE NATURALIST PROBLEM

There are two major objections to legal naturalism's account of validity which suggest that such a theory, in its current state, cannot offer an adequate theoretical explanation of the status of inter-

39. H. Kelsen, *supra* note 2, at 324.

40. H. Hart, *supra* note 3, at 228.

41. For a social scientific objection to the positivist account of international law, see, e.g., Finnegan, *Three Models of Science in the Study of International Law*, 8 CAL. W. INT'L J. 274 (1978).

national law. The first objection flows from the claimed necessary connection between law and morals⁴² and the existence and requirement of so-called "morally neutral" rules. The second objection flows from the dynamic aspect of legal systems.

While legal naturalism is more than the simple assertion that only morally correct rules are valid,⁴³ the validity of any rule depends, to a significant extent, upon its moral content. Yet there are rules which appear to be morally neutral, if not totally arbitrary. Rules regarding the requisite number of witnesses to a valid will or the location of the International Court of Justice, for example, seem incapable of being justified or rejected strictly on the basis of some overriding natural principle. The problem which the legal naturalist must overcome is that legal systems have such rules, and in these morally neutral areas, there often is conflict between systems. If legal naturalism were adequate, then, ideally, there would be no conflict between systems.

The naturalist may reply that there is a need to distinguish substantive rules from procedural rules and that it is only the former which are to be governed by the naturalist principle. The rationale for such a claim is that the procedural rules are merely means for attaining the goals of the substantive rules. Since there are, usually, many paths to the same destination, the apparent conflict between systems regarding procedural rules is of no consequence.

Apart from the practical difficulties inherent in drawing such a distinction,⁴⁴ the distinction itself points out the essential difference between legal and moral systems. The significance of that difference is that appropriate criticism of a legal system is much broader than appropriate criticism of a moral system. Additionally, such a distinction appears to lead to the primary-secondary rules distinction which is an essential element of legal positivism.⁴⁵

While this first objection, alone, may be surmountable (*e.g.*, by narrowing the view of legal naturalism to substantive rules only), coupling it with the second objection appears to defeat legal naturalism. Legal systems are dynamic in that the rules are constantly changing: there is both expansion and contraction of their scope. If legal rules are valid only to the extent that they conform to natural principles, one would expect that no such change would occur. The naturalist reply to such an objection must be that no legal system

42. D. RICHARDS, *THE MORAL CRITICISM OF LAW* 8 (1977).

43. See note 29 *supra* and accompanying text.

44. See, *e.g.*, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) and its progeny.

45. See notes 7-21 *supra* and accompanying text.

has yet reached the naturalist ideal. While this may be so, the naturalist conclusion must be that it is theoretically possible to reach a point where change will be unnecessary. Even setting aside all pessimism, such a state of affairs appears unlikely.

V. RECENT DEVELOPMENTS SUGGESTING A MIDDLE THEORY

Since neither the legal positivists nor the legal naturalists appear able to provide an adequate theoretical account of the existence of international law, there is a need to look elsewhere for a conceptual explanation. Fortunately, the groundwork for such an enterprise has been provided by two recent contributions in the field of jurisprudence and one in political philosophy. With the publication of *Taking Rights Seriously*⁴⁶ and *The Moral Criticism of Law*,⁴⁷ and the widespread influence of *A Theory of Justice*⁴⁸ within the legal community, the theoretical framework for a hybridization of positivism and naturalism has been created.

David A. J. Richards has suggested this hybridization as *methodological natural law* theory.⁴⁹ The significance of Richards' approach is that it does not draw the sharp distinction drawn by positivism between legal and moral criticism of law:

The most striking feature of methodological natural law theory, constituting a significant departure from traditional conceptions of the philosophy of law, is its concern with the moral analysis of concrete legal institutions and issues. Recent philosophy of law has focused on the abstract conceptual analysis of law and legal notions in general. Such examinations are, of course, important and useful. But, they are only one part of the proper territory which the philosophy of law should investigate. Methodological natural law theory seeks to correct this imbalance of theoretical inquiry by focusing philosophical analysis on concrete problems where law and morals systematically interconnect.⁵⁰

Richards' approach, then, is to recognize that legal theory is a partnership of the positivists' conceptual analysis and the naturalists' substantive analysis.

This approach appears to be that taken by Ronald Dworkin.⁵¹

46. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

47. D. RICHARDS, *supra* note 42.

48. J. RAWLS, *A THEORY OF JUSTICE* (1971).

49. D. RICHARDS, *supra* note 42, at 31-36.

50. *Id.* at 33-34.

51. See Richards, *Taking 'Taking Rights Seriously' Seriously: Reflections on Dworkin and the American Revival of Natural Law*, 52 N.Y.U.L. REV. 1265 (1977).

Hercules, Dworkin's hypothetical ideal judge, reaches decisions in hard cases on the basis of considerations which, according to a strict positivist account, are extra-legal.⁵² Hercules is permitted, if not required, to reflect upon "the concepts that figure in the justification of the institutions of his own community"⁵³ in his deliberations.

The contributions of John Rawls to this enterprise can serve as a starting point for the evaluation of the substance of international agreements. While much thought is required regarding the applicability of Rawls' "*veil of ignorance*"⁵⁴ metaphor to the relationships among nations, once agreement can be reached as to the appropriate ontological status nations should be accorded, it appears likely that conclusions similar to the two principles of justice⁵⁵ can be reached with respect to the guiding principles of international law. The veil of ignorance is Rawls' account of the hypothetical execution of the familiar social contract.

The extent to which the recent contributions of Rawls, Dworkin, and Richards bear on international law remains to be seen. No one has yet extended these theories to the problem. Whether such extension will avoid the problems encountered by the positivist and naturalist accounts is, at present, unknown. It is hoped that this discussion has identified the issues to be addressed and will encourage future discussion. Finally, it is hoped that such a discussion will result in the establishment of a set of principles upon which a comprehensive jurisprudential theory of international law can be based.

Peter N. Scolney

52. R. DWORKIN, *supra* note 46, at 105-30.

53. *Id.* at 128. *See id.* at 126-29.

54. J. RAWLS, *supra* note 48, at 136-42.

55. *Id.* at 302.

